

2020 RELEASE UNDER E.O. 14176

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

**ORDER DISMISS MOTION TO MODIFY
SENTENCE PURSUANT TO 28 U.S.C. § 2255
WITH PREJUDICE AS UNTIMELY**

Presently before the Court is Defendant's Motion to Modify Sentence Pursuant to 28 U.S.C. § 2255.¹ Defendant contends that he was denied effective assistance of counsel when his attorney failed to request a four count reduction at his sentencing based on his status as a Vietnam War refugee. (Motion at 2.)

A prisoner who is in custody under the sentence of a federal court who claims the right to be released may move the court to vacate, set aside, or correct the sentence on the grounds that (1) the sentence violates the Constitution or laws of the United States; (2) the court did not have jurisdiction to impose the sentence; or (3) the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. 28 U.S.C. § 2255. When evaluating a motion brought under § 2255, a court must issue an order directing the respondent to show cause why the motion should not

1 (hereafter, Motion, Docket Item No. 1098.) Unless otherwise noted, all citing references
2 are to Docket No. C 98-20060. Defendant pleaded guilty to aiding and abetting the use and carrying
3 of firearms in connection with an armed robbery; he is currently serving a 130 month sentence. (See
4 Docket Item Nos. 524, 746.)

United States District Court
For the Northern District of California

1 be granted unless it plainly appears from the “motion and the files and records of the case . . . that
2 the prisoner is entitled to no relief.” Id. Section 2255 motions must be brought within one year of
3 the latest of the following:

4 (1) the date on which the judgment of conviction becomes final;
5 (2) the date on which the impediment to making a motion created by governmental
6 action in violation of the Constitution or laws of the United States is removed, if the
7 movant was prevented from making a motion by such governmental action;
8 (3) the date on which the right asserted was initially recognized by the Supreme Court, if
9 that right has been newly recognized by the Supreme Court and made retroactively
10 applicable to cases on collateral review; or
11 (4) the date on which the facts supporting the claim or claims presented could have been
12 discovered through the exercise of due diligence.

13 28 U.S.C. § 2255.

14 Defendant pleaded guilty on February 27, 2001 and was sentenced on May 6, 2002. By the
15 terms of the plea agreement, Defendant waived any right to appeal. (See Docket Item No. 525.)
16 Defendant filed the current Motion on July 17, 2007, more than five years after his judgment of
17 conviction became final. Thus, Defendant has failed to file within the statute of limitations.²

18 Accordingly, the Court DISMISSES Defendant’s Motion to Modify Sentence with prejudice
19 as untimely.

20 Dated: December 14, 2009

21 
22 JAMES WARE
23 United States District Judge

24
25 ² On March 23, 2004, the parties filed a Stipulation to correct the judgment and
26 commitment, which the Court approved. (Docket Item No. 932.) Even if the Court were to give
27 Defendant this later date in light of the amended judgment, Defendant’s Motion would still be
untimely since it was filed in 2007, nearly three years later.

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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7

8 **Dated: December 14, 2009**

Richard W. Wiking, Clerk

9

10 **By: /s/ JW Chambers**
Elizabeth Garcia
Courtroom Deputy